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Tee Bee Chin (P) v Goh Swee Por (L)

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HIGH COURT (SHAH ALAM) — JUDICIAL SEPARATION PETITION NO BA-33–391–06 OF 2017
HAYATUL AKMAL JC
13 FEBRUARY 2018

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Family Law — Protection — Injunction against molestation — Petition for judicial separation — Petitioner filed interim ex parte order for injunction against molestation — Whether there was non-compliance for Rules of Court 2012 and Divorce Marriage Proceeding Rules 1980 — Whether there were sufficient grounds under s 103 of the Law Reform (Marriage and Divorce) Act 1976 to grant injunctive relief — Divorce Marriage Proceeding Rules 1980 r 102 — Law Reform (Marriage and Divorce) Act 1976 s 103 — Rules of Court 2012 O 1A

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The petitioner wife ('the petitioner') had filed a petition for judicial separation against the respondent husband ('the respondent') seeking sole guardianship, custody, care and control of the child. Pending the disposal of the petition, the petitioner filed an application for ancillary relief, claiming maintenance for her and the child. Subsequently, the petitioner applied for an interim ex parte order for injunction against molestation ('encl 4, prayer 6') which was granted by the court. The main reason for the application was that, the interim protection order ('IPO') that was obtained by the petitioner against the respondent had now lapsed and the petitioner needed continuous protection order pending the disposal of the petition. In response, the respondent filed an application ('encl 21') to set aside the ex parte order. The petitioner submitted that a bona fide serious issue to be tried had been disclosed and justice of the case would require that the status quo ie the protection for the petitioner to continue pending final determination of the said petition for judicial separation. The issue raised was whether there was non-compliance of the Rules of Court 2012 ('the ROC') and the Divorce and Marriage Proceeding Rules 1980 ('the DPMR').

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Held, allowing encl 4, prayer 6 with costs of RM4,000 and dismissing encl 21 with costs of RM3,000:

(1) Order 1A of the ROC provides that in administering justice, the court shall have regard to the overriding interest of justice and not the technical non-compliance with the rules. Therefore, the failure to specify the intitule was mere technical irregularities which would not render the proceeding or application void in the circumstances of the case. It was the duty of the court to not merely dispose of cases but strictly to dispense

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justice as the circumstances of the case demanded. Therefore, the said objection was merely procedural and not to the merits of the facts as adduced by the petitioner (see para 21).

(2) Rule 102 of the DPMR provides that non-compliance with these Rules or any rule of practice in force shall not render proceedings void unless ordered by the court. Therefore, whether the application for injunctive relief was filed separately or in the same petition was mere technical irregularities which would not render this proceeding or application void (see para 23).

(3) In the present case, the petitioner lodged a police report, and IPO was granted and after an investigation, the respondent was charged in the Magistrate Court Petaling Jaya. The said IPO had since lapsed, all these factors were sufficient grounds under s 103 of the Law Reform (Marriage and Divorce) Act 1976 to grant the injunctive relief as prayed for by the petitioner for her continued protection (see para 27).

[Bahasa Malaysia summary

Pempetisyen isteri ('pempetisyen') telah memfailkan petisyen untuk pemisahan kehakiman terhadap responden suami ('responden') memohon penjagaan tunggal, jagaan, penjagaan dan kawalan anak mutlak anak tersebut. Sementara menunggu petisyen itu selesai, pempetisyen telah memfailkan permohonan untuk relief sampingan, menuntut nafkah untuk dirinya dan anak tersebut. Berikutan itu, pempetisyen telah memohon untuk perintah ex parte sementara untuk injunksi terhadap pencabulan ('lampiran 4, permohonan 6') yang telah diberikan oleh mahkamah. Alasan utama untuk permohonan itu adalah bahawa, perintah perlindungan sementara ('IPO') yang diperoleh oleh pempetisyen terhadap responden telah luput dan pempetisyen memerlukan perintah perlindungan yang berterusan sementara menunggu petisyen tersebut selesai. Sebagai jawapan, responden telah memfailkan permohonan ('lampiran 21') untuk mengetepikan perintah ex parte. Pempetisyen telah berhujah bahawa isu bona fide serius yang perlu dibicarakan telah didedahkan dan keadilan kes menghendaki agar *status quo* iaitu perlindungan untuk pempetisyen diteruskan sehingga selesai penentuan muktamad petisyen tersebut untuk pemisahan kehakiman. Isu yang ditimbulkan adalah sama ada terdapat ketidakpatuhan Kaedah-Kaedah Mahkamah 2012 ('KKM') dan Kaedah-Kaedah Prosiding Perkahwinan dan Perceraian 1980 ('KPPP').

Diputuskan, membenarkan lampiran 4, permohonan 6 dengan kos RM4,000 dan menolak lampiran 21 dengan kos RM3,000:

(1) Aturan 1A KKM memperuntukkan bahawa dalam mentadbir keadilan, mahkamah hendaklah mengambil kira kepentingan utama keadilan dan bukan ketidakpatuhan teknikal dengan kaedah-kaedah tersebut. Oleh itu, kegagalan untuk menyatakan intitul hanya luar aturan teknikal

sahaja yang tidak menjadikan prosiding atau permohonan tidak sah dalam keadaan kes. Ia adalah kewajipan mahkamah untuk tidak hanya menyelesaikan kes tetapi melaksanakan keadilan dengan tegas sebagaimana yang dituntut oleh keadaan kes. Justeru, bantahan tersebut hanya procedural dan tidak mempunyai merit kepada fakta yang dikemukakan oleh pempetisyen (lihat perenggan 21).

(2) Aturan 102 KPPP memperuntukkan bahawa ketidakpatuhan dengan Kaedah-Kaedah tersebut atau mana-mana kaedah amalan yang berkuat kuasa tidak sepatutnya menjadikan prosiding tidak sah kecuali diperintahkan oleh mahkamah. Oleh itu, sama ada permohonan untuk relif injunksi telah difailkan secara berasingan atau dalam petisyen yang sama adalah hanya luar aturan teknikal yang tidak menjadikan prosiding atau permohonan ini tidak sah (lihat perenggan 23).

(3) Dalam kes ini, pempetisyen telah membuat laporan polis, dan IPO telah diberikan dan selepas siasatan, responden telah dituduh di Mahkamah Majistret Petaling Jaya. IPO tersebut telahpun luput, kesemua faktor tersebut adalah alasan mencukupi di bawah s 103 Akta Undang-Undang Pembaharuan (Perkahwinan dan Perceraian) 1976 untuk memberikan relif injunksi sebagaimana dipohon oleh pempetisyen untuk perlindungan berterusannya (lihat perenggan 27).]

Notes

For a case on injunction against molestation, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4885.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504, HL (refd)

Chan Ah Moi v Phang Wai Ann [1995] 3 MLJ 130; [1995] 3 CLJ 846, HC (refd)

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (refd)

Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor [2008] 4 MLJ 701; [2012] 1 LNS 896, CA (refd)

Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors [2007] 5 MLJ 339; [2007] 1 LNS 107, HC (refd)

Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 1 CLJ 721, CA (refd)

George v George [1986] 2 FLR 347, CA (refd)

Hock Seng Construsction Sdn Bhd & Anor v Yeoh Poh Owi & Anor [2001] 3 MLJ 491; [2001] 4 CLJ 1, CA (refd)

Jennifer Patricia a/p Thomas v Calvin Martin a/l Victor David [2005] 6 MLJ 728; [2005] 7 CLJ 133, HC (refd)

Johnson v Walton [1990] 1 FLR 350, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 316; [2004] 1 CLJ 239, CA (refd)
Lee Sook Kwan v Yap Woon Woi [2010] MLJU 2215; [2010] 1 LNS 1362, HC (refd)
Sheng Lien @ Sheng Len Yee v Tan Teng Heng & Anor [2010] MLJU 2216; [2010] 1 LNS 1480, HC (refd)
Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah [2011] 3 MLJ 123; [2010] 2 CLJ 736, HC (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533, FC (refd)
Susila a/p S Sankaran v Subramaniam a/l P Govindasamy [2012] 9 MLJ 779; [2013] 4 CLJ 579, HC (refd)
Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188; [1975] 1 LNS 178, FC (folld)
Vaughan v Vaughan [1973] 3 All ER 449; [1973] 1 WLR 1159, CA (refd)

Legislation referred to

Divorce and Matrimonial Proceedings Rules 1980 rr 2, 56, 56(1), (3), 102, Form 11
Domestic Violence Act 1994 s 2
Law Reform (Marriage and Divorce) Act 1976 ss 76, 77, 103, 106
Penal Code s 323
Rules of Court 2012 O 1A, O 29, O 29 r 1(2), Form 57
Rules of the Supreme Court

Honey Tan Lay Ean (Wong Chong Ee with her) (Tan Law Practice) for the petitioner.
Loke Yuen Hong (Melissa Teh Sze Yee with him) (Low and Partners) for the respondent.

Hayatul Akmal JC:

INTRODUCTION

[1] On 19 June 2017, the petitioner wife ('the PW') filed a petition for judicial separation against the respondent husband ('the RH') seeking sole guardianship, custody, care and control of the child of the marriage and other prayers.

[2] Pending the disposal of this petition, the PW had on 23 June 2017 filed an application for ancillary relief (encl 4), claiming maintenance for her and the child of the marriage and other prayers. The PW subsequently applied for

an interim ex parte order (encl 4, prayer (6)) which was granted by this court on 4 July 2017. The parties have on 31 July 2017 agreed to an ad interim order pending inter parte hearing. Subsequently on 21 August 2017, the RH filed an application (encl 21) to set aside the ex parte order granted earlier by this court.

[3] To save cost and time of the parties and of the court, I have decided that both applications (for encl 4 (prayer 6) and encl 21) to be heard simultaneously. The parties had in between them, filed voluminous affidavits which can be seen from the list below. For ease of reference, I have divided the relevant cause papers and written submissions, as follows:

Enclosure 4:

(a) encl 4: the PW's application for ancillary relief filed on 23 June 2017;

(b) encl 5: the PW's affidavit in support (1) affirmed by Tee Bee Chin on 22 June 2017;

(c) encl 12: the PW's affidavit (2) affirmed by Tee Bee Chin on 30 June 2017;

(d) encl 17: the RH's affidavit in reply affirmed by Goh Swee Poh on 26 July 2017; and

(e) encl 19: the PW's affidavit (3) affirmed by Tee Bee Chin on 11 August 2017;

Enclosure 21:

(a) encl 21: the RH's application via summon-in-chambers ('SIC') to set aside the ex parte order (encl 4), filed on 21 August 2017;

(b) encl 22: the RH's affidavit in support (2) affirmed by Goh Swee Poh on 21 August 2017;

(c) encl 20: affidavit of RH's eye witness, affirmed by Hoo Kok Kwan on 18 August 2017; and

(d) encl 24: affidavit of RH's eye witness, affirmed by Goh Swee Pheng on 22 August 2017.

Joined affidavits for both encl 4 (prayer 6) and encl 21:

(a) encl 27: the PW's affidavit (4) affirmed by Tee Bee Chin on 5 September 2017;

(b) encl 29: the RH's affidavit (3) affirmed by Goh Swee Poh on 5 September 2017;

(c) encl 31: the PW's affidavit (5) affirmed by Tee Bee Chin on 13 September 2017;

(d) encl 32: the RH's affidavit (4) affirmed by Goh Swee Poh on 19 September 2017;

(e) encl 33: the PW's affidavit (6) affirmed by Tee Bee Chin on 19 September 2017;

(f) encl 39: the PW's affidavit (7) affirmed by Tee Bee Chin on 22 August 2017;

(g) encl 40: the RH's affidavit (5) affirmed by Goh Swee Poh on 16 October 2017;

(h) encl 43: additional affidavit of RH's eye witness, affirmed by Hoo Kok Kwan on 26 October 2017;

(i) encl 45: the RH's affidavit (6) affirmed by Goh Swee Poh on 30 October 2017;

(j) encl 50: the PW's affidavit (8) affirmed by Tee Bee Chin on 16 November 2017; and

(k) encl 55: the RH's affidavit (8) affirmed by Goh Swee Poh on 28 November 2017;

Submissions:

(a) encl 66: the PW's written submission (encl 4 (prayer 6));

(b) encl 64: the RH's written submission; and

(c) encl 67: the PW's reply submission (encl 21).

[4] Both applications were heard before me on 19 December 2017 and after perusing the cause papers filed and respective written submissions of the parties, on balance of probability, I hold as follows:

(a) encl 4 (prayer (6)): Order in terms and costs of RM4,000 was awarded to the PW; and

(b) encl 21, SIC was dismissed with costs of RM3,000.

Dissatisfied, the RH had filed this appeal against my decisions above and my reasons are as follows.

BRIEF FACTS

[5] The brief facts disclosed from the cause papers are as follows.

[6] The PW and the RH, were legally married on 16 February 2015 and are blessed with a son Goh Wei Zhe, age two years plus ('the said child'). Unfortunately, the marriage was short lived, and it fell apart. The PW alleged

that RH was abusive to her, physically and mentally. RH on the other hand alleged that the marriage did not work due to irreconcilable differences and disagreements on family values. The turmoil escalated when on 23 March 2017, the PW alleged that the RH was physically abusive to her, a police report was lodged which resulted in a criminal charge brought against the RH under s 323 of the Penal Code.

[7] On 19 June 2017, the PW filed this petition for judicial separation (encl 1) against the RH seeking for judicial separation and for sole guardianship, custody, care and control of the said child and other prayers.

[8] Pending the disposal of this petition, the PW had on 23 June 2017 filed an application for ancillary relief (encl 4), which among others, claiming maintenance for her and the child of the marriage and other prayers. However, before the said application could be heard inter parte, PW applied for an ex parte interim order as regards to encl 4 prayer (6) which reads as follows:

> 6. That the Respondent, his servants, agents and/or representatives be restrained from stalking harassing and/or attempting to stalk and/or harass the Petitioner whether in cyber-space or otherwise and/or from committing or attempting to commit domestic violence against the Petitioner:

[9] The main reason for the above application was that, the IPO that was obtained by the PW on 26 April 2017 against the RH has now lapsed and the PW needed a continuous protection order pending the disposal of this petition. In other words, for her safety, the PW prayed that the RH is refrained from stalking her and harassing her as per the said prayer. I granted the PW the ex parte interim order as regards to (encl 4, prayer (6)) and a further direction that the matter to be heard inter parte within 14 days from the date thereof. On 31 July 2017, the RH by consent agreed to convert the ex parte interim order to an ad interim order pending the inter parte disposal of (encl 4 prayer (6)). However, before the inter parte hearing, the RH had on 21 August 2017, filed a SIC (encl 21) to set aside the said ex parte interim order.

Submission by the petitioner wife ('the PW')

[10] The PW submitted that even though the RH denied the allegation of abuse, it is undisputed that on 23 March 2017, the PW lodged a police report pursuant to the physical acts of domestic violence committed by the RH against her and as a result, the PW suffered physical injuries and was treated at the UKM Medical Centre. The PW was granted an IPO by the Petaling Jaya Magistrate's Court, ie, an interim protection order to protect the PW from the aggression of the RH pending the investigation of domestic violence committed by the RH against her. The said IPO was only served on the RH on

8 August 2017 and he was charged under s 323 of the Penal Code at the Petaling Jaya Magistrate's Court.

[11] The PW submitted that at this juncture, premised on the undisputed facts, a bona fide serious issue to be tried has been disclosed. Justice of the case would require that the status quo, ie, the protection for PW to continue pending the final determination of the said petition for judicial separation. Despite the RH's denial of being abusive to the PW, by way of CCTV recordings, clearly showed the RH's acts of physical violence inflicted on the PW to which he then admitted. In the circumstances of the case, an interlocutory injunction against molestation is necessary for the PW's continued protection pending final determination of the said petition for judicial separation.

[12] The PW further submitted that an ex parte injunctive order was granted on 4 July 2017 and has been consented to by the RH to continue by on an ad interim basis. RH has failed to show any real prejudice suffered in the event encl 4, para 6 is granted. It is further noted that the RH is not seeking damages in encl 21 and learned counsel for the PW prayed for order in-terms for (encl 4, (prayer 6)) and that the application to set it aside (encl 21) be dismissed because there is no loss or damage suffered by the RH.

Submission by the respondent husband ('the RH')

[13] The ex parte order should be set aside because of material non-compliance of the Rules of Court 2012 ('the RC 2012') and Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980'). The PW has failed to state the rule governing the application for an injunction in the intitule of the PW's application. The PW has failed to file an ex parte application seeking for the ex parte injunction.

[14] Prayer 6, being an injunctive relief in nature, shall not be made by way of ancillary relief in Form 11, instead shall be made by way of notice of application in Form 57 in the RC 2012. The PW has failed to comply with the procedural requirements under O 29 of the RC 2012, where the PW has failed and/or refused and/or neglected to make full disclosure of material facts, including facts detrimental to her own case, as required thereunder.

[15] Despite the voluminous affidavits, the alleged domestic violence is based solely on one incident on 23 March 2017 which the PW in her affidavit alleged that the RH's purported acts of physical violence has caused her great emotional injury and she is in constant fear that she is being followed and that she may be physically attacked by the RH. This is a fabrication with malicious intention that is to deprive and/or restrict the RH's right of access to the said

child. The PW's allegation against the RH for domestic violence is baseless, not substantiated with any contemporaneous evidence, devoid of merit and is a mere sham.

[16] The alleged domestic violence is also to seek monetary compensation from the RH as a revenge and extra income. Learned counsel submitted that the PW contradicts her own statements in the affidavits filed. The PW's purported evidence, for instance medical reports or photos of the purported injuries sustained, is riddled with errors and mistakes, and/or tampered. The averment of the RH in his affidavits are collaborated with contemporaneous evidence, ie, the CCTV footages, Mr Hoo Kok Kwan's statements, photo and video recorded by PW's friend, Chia. Before coming to the Mutiara Damansara House on 23 March 2017, PW already had the malicious 'idea' of victimising herself and then accuses the RH of the offence. Therefore, the RH prays that the ex parte order granted by this court be set aside.

THE LAW

[17] It is trite that the following considerations must be weighed on the balance of convenience before an interlocutory injunction can be granted:

(a) that there are serious issues to be tried;

(b) that the balance of convenience lies on the side of granting the injunction. In this respect the court must consider the harm that the injunction would produce by its grant and the harm that would result from its refusal thereof;

(c) that damages are not an adequate remedy;

(d) the sufficiency of the undertaking of damages given by applicant; and

(e) the sufficiency of the undertaking of the defendant to compensate the plaintiff in the event of judgment in the plaintiff's favor.

(See: *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293; *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533.)

[18] Section 103 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the LRA'), provides the court with the power to grant injunctive relief against molestation, as follows:

> 103 Injunction against molestation
>
> The court shall have power during the pendency of any matrimonial proceedings or on or after the grant of a decree or divorce, judicial separation or annulment, to

A order any person to refrain from forcing his or her society on his or her spouse or former spouse and from other acts of molestation

[19] Section 2 of the Domestic Violence Act 1994 (Act 521) ('the DVA') defines domestic violence as follows:

B 2(a) wilfully or knowingly placing, or attempting to place the victim in fear of physical injury;

(b) causing physic al injury to the victim by such act which is known or ought to have known would result in physical injury;

C (c) ...

(d) ...

(e) ...

(f) ...

D (g) ...

(h) ...

FINDINGS OF THIS COURT

E *Non-compliance of the Rules of Court 2012 and the Divorce Marriage Proceeding Rules 1980*

[20] Before I proceed further, I wish to briefly touch on the issue whether F there is non-compliance of the RC 2012 and the DMPR 1980. Learned counsel for the RH argued that:

(a) no intitule to reflect that the application is for an injunctive relief pursuant to O 29 of the RC 2012 and therefore it's fatal. I was alluded to the Court of Appeal case of *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 where it was held that failure to state the correct intitule is fatal:

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Gopal Sri Ram JCA (as His Lordship then was) said:

H ... The Summons does not, as I observed very early in this judgment, state any particular Rule of Court in the intitule. Now, I think that it is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it. If a defendant and the court should have to conduct a close examination of the supporting affidavit in each case in order to determine the

I particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitule, then the plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning or whatsoever to his opponent or the court ...

(b) r 56 of the DMPR 1980 provides that an application for ancillary relief shall be made in the petition by the petitioner or respondent who files an answer claiming relief, for an order for maintenance pending suit, a property division order, under s 76 of the Act; or a maintenance order, under s 77 of the Act;

(c) r 56(3) of the DMPR 1980 provides that, an application by a petitioner or respondent for ancillary relief, not being an application, which is required to be made in the petition or answer shall be made by notice in Form 11. Enclosure 4 (prayer 6), being the PW's ancillary relief application, is made by way of Form 11 under the DMPR 1980 is governed under the DMPR 1980 and the relief provided is only exclusive to those stated in the DMPR. I was alluded to the case of *Susila a/p S Sankaran v Subramaniam a/l P Govindasamy* [2012] 9 MLJ 779; [2013] 4 CLJ 579, where it was held that for ancillary relief under the LRA, there are mandatory obligations and specific steps to be taken by the applicant and Yeoh Wee Siam J dismissed the application on the basis that wrong mode of commencement was adopted;

(d) r 2 of the DPMR 1980 define ancillary relief as an avoidance of disposition order; a financial provision order; an order for maintenance pending suit; a property adjustment order, or a variation order and therefore, clearly ancillary relief does not include or extend to injunctive relief; and

(e) O 29 r 1(2) of the RC 2012 provides, an application for injunction may be made by a notice of application supported by an affidavit and where the case is one of urgency, may be made ex parte and it refers to Form 57 in the RC 2012. However, in the present case, instead of seeking an injunctive relief urgently vide an ex parte application by way of Form 57 in the RC, the PW has intentionally disregard the provisions under the governing rule O 29 of the RC by simply slotting in the prayer in her ancillary relief application, which clearly is not the right application for any injunctive relief.

[21] On the failure to specify the intitule, I refer to O 1A of the RC 2012 which provides that in administering justice, the court shall have regard to the overriding interest of justice and not to the technical non-compliance with the rules. Therefore, to my mind such failure is mere technical irregularities which will not render this proceeding or application void in the circumstances of the case. It is the duty of the court to not merely dispose of cases but strictly to dispense justice as the circumstances of the case demands. Therefore, to my mind, the said objection is merely procedural and not to the merits of the facts as adduced by the PW. See Hamid Sultan J in *Dato Ting Check Sii v Datuk Haji Mohamad Tufail bin Mahmud & Ors* [2007] 5 MLJ 339; [2007] 1 LNS 107 held as follows:

15. Court's time is often unnecessarily wasted by procedural objections and technicalities raised without regard to rules and case laws which condone procedural non-compliance ...:

(a) As a general rule, the parties to a civil proceeding must strictly comply with the rules of the court. However, where parties have by reason of anything done or left undone failed to comply with the requirements of the rules of the court, whether in respect of time, place, manner, form or content or in any other respect, the court is required to treat the failure of non-compliance as an irregularity and the failure does not nullify the proceedings or any steps taken in the proceedings or any documents, judgment or order therein ...

(b) Dismissal of an action for non-compliance of procedural rules has been an anathema in procedural jurisprudence. To avert procedural miscarriage of justice, Order 2 of the *Supreme Court Practice* (white book) was introduced in England. It was meant to be a saving provision to condone procedural irregularities ...

[22] Justice Abdul Hamid Mohamad FCJ sitting in the Court of Appeal in the case of *Hock Seng Construsction Sdn Bhd & Anor v Yeoh Poh Owi & Anor* [2001] 3 MLJ 491; [2001] 4 CLJ 1, held that the main function of the court is to do justice and not just to dispose cases. Further, His Lordship stated that it was unjust to dismiss a matter without hearing merits simply because of the mistake of the solicitor in not complying with the rules. I am also guided by the observation of Suffian LP in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188; [1975] 1 LNS 178 where His Lordship held, the Rules of the Supreme Court are intended to facilitate, not impede the administration of civil justice. Therefore, it is clear that this court has a wide judicial discretion in addressing the issue of any irregularities to ensure that the administration of justice is not prejudiced nor impeded in any manner.

[23] On whether the PW should file separately for the injunctive relief and not under the application for ancillary relief as provided for r 56(1) of the DMPR 1980. I refer to LRA which provides the provision for other reliefs under the Act where s 103 specifically provides for injunction against molestation. The next question to be asked is whether encl 4 (prayer (6)) falls under the category of molestation. I refer to the case of *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721 (CA) where the Court of Appeal held that the LRA is a social legislation for which a liberal interpretation is more apt than a strict one. I refer to r 102 of the DMPR 1980 which provides non-compliance with these rules or any rule of practice in force shall not render proceedings void unless ordered by the court. Therefore, to my mind whether the application for injunctive relief was file separately or in the same petition is mere technical irregularities which will not render this proceeding or application void.

[24] The word molestation is not defined in the LRA. However, in Davies LJ, in *Vaughan v Vaughan* [1973] 3 All ER 449 at p 452; [1973] 1 WLR 1159 at pp 1162–1163 stated that:

> According to counsel for the husband we find two different definitions respectively in the *Concise Oxford Dictionary* and the *Shorter Oxford Dictionary*. The former gives the meaning for molest as 'meddle hostilely or injuriously'. The *Shorter Oxford Dictionary* gives a much wider definition in these terms; 'to cause trouble; to vex; to annoy; to put into inconvenience'.

George v George [1986] 2 FLR 347 and *Johnson v Walton* [1990] 1 FLR 350, adopted Davies LJ's approach to the meaning of 'molestation' in *Vaughan v Vaughan*. What goes on behind the closed doors of the matrimonial home is anyone's guess. It is clear that the general criminal law is inadequate to deal with domestic violence. Battered housewives would simply suffer at the hands of their outraged husbands. There is currently no power under criminal law to injunct errant husbands from molesting timid housewives. Battered housewives are now a matter of grave public concern (see *Chan Ah Moi v Phang Wai Ann* [1995] 3 MLJ 130; [1995] 3 CLJ 846 per Abdul Malik Ishak J; *Words, Phrases & Maxims (Legally & Judicially defined)*, LexisNexis 2008, Anandan Krishnan, Vol 11 at pp 152 and 253). I wish to refer to prayer (6) which when read as a whole definitely falls under the category for molestation. Injunctions are generally granted under this section where infliction of physical and mental injury and threats thereof are concerned (see *Chan Ah Moi v Phang Wai Ann*; *Lee Sook Kwan v Yap Woon Woi* [2010] MLJU 2215; [2010] 1 LNS 1362). Molestation also applies to any conduct which intentionally causes harassment (see *Johnson v Walton* [1990] FCR 568; [1990] 1 FLR 350 (CA)).

[25] I also refer to the case of *Jennifer Patricia a/p Thomas v Calvin Martin a/l Victor David* [2005] 6 MLJ 728; [2005] 7 CLJ 133 where in that case, the husband had objected to the wife's prayer for an injunction against molestation on the ground that there was no pending matrimonial proceeding for divorce or judicial separation. In interpreting the expression 'during the pending in any matrimonial proceedings' in s 103 of the LRA, the court was of the view that the procedural step taken by the wife in order to obtain a certificate from the conciliatory body under s 106 of the LRA would be sufficient to trigger off the invocation of the LRA as it constituted the pendency of matrimonial proceedings so that the wife was at liberty to apply for the injunction against molestation under s 103 of the LRA. The court granted an injunction against molestation. Base on the above observation, to my mind I can proceed in hearing the applications I have before me.

Injunctive relief and setting aside application

[26] Learned counsel for the PW submitted that a bona fide serious issue to be tried has been disclosed. Justice of the case would require that the status quo,

ie protection for the PW to continue pending final determination of the said petition for judicial separation. The RH had not been able to show any real damage suffered by him in the event encl 4 para (6) is granted. It is further noted that the RH is not seeking damages in encl 21 and pray that the said application to set aside the ex parte order as contained in encl 4 (para 6), be dismissed with cost. I was alluded to Court of Appeal case of *Chong Sui Jin & Ors v Jeramas Sdn Bhd & Anor* [2008] 4 MLJ 701; [2012] 1 LNS 896, where it was held that in an application for interlocutory injunction, the court only needs to find bona fide serious issue to be tried. PW submits that at this juncture, premised on the undisputed facts above and the affidavits filed, bona fide serious issues to be tried had been disclosed. Justice of the case would require that the status quo, ie, the protection for the PW to continue until final determination of the said petition.

[27] The PW submitted that even though the RH denied the allegation of abuse, it is undisputed that; on 23 March 2017, the act of physical domestic violence was inflicted by the RH on the PW. She was granted an IPO, an order to protect the PW from the RH pending the investigation of domestic violence so committed. Learned counsel referred to the case of *Sheng Lien @ Sheng Len Yee v Tan Teng Heng & Anor* [2010] MLJU 2216; [2010] 1 LNS 1480 where Yeoh Wee Siam J in granting injunctive order under order s 103 based solely on PW's fear, despite the absence of physical abuse and police report and said 'the court does not have to wait for the day when violence occurs before it grants such Order, that would be too late'. I refer to the case *Shireen a/p Chelliah Thiruchelvam v Kanagasingam a/l Kandiah* [2011] 3 MLJ 123; [2010] 2 CLJ 736, where Suraya Othman J said the fact that the plaintiff had obtained an IPO was sufficient grounds under s 103 of the LRA to grant an injunction to ensure the safety of the plaintiff and the children. In the present case, the PW lodged a police report, an IPO was granted and after an investigation RH was charged in the Magistrates Court Petaling Jaya. The said IPO has since lapsed, all these factors to my mind are sufficient grounds under s 103 of the LRA to grant the injunctive relief as prayed for by PW for her continued protection.

[28] Learned counsel for the RH further argued that the ex parte order ought to be set aside on the ground that the PW had failed to satisfy one of the vital requirements for an injunction, namely full and frank disclosure of material facts including facts unfavourable to the PW. I was alluded to Court of Appeal case in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 316; [2004] 1 CLJ 239 where it was held that it is trite law that in any application it is essential that there must be full frank and fair disclosure of all relevant materials including points that may be unfavourable to an applicant.

[29] The purported undisclosed facts referred to by the RH are as follows:

(a) there were exchanges of Whatsapp chats between PW and RH that would go to show that there was no domestic violence involved between them. Allegedly it the said chats indicate that PW was still trying to salvage the marriage and she was not fearful and traumatised by RH;

(b) the PW's former solicitor's letter dated 15 March 2017 had vehemently denied that the marriage had broken down irretrievably;

(c) the RH had been the parent taking care of the child all the while until the PW took the child away;

(d) the PW had complimented that the RH is a good husband and father to the child;

(e) the PW had denied him access to the said child and refuses to answer to his repeated calls;

(f) the failure by the PW to update the RH on the status of the child;

(g) the PW proposing to dissolve the marriage amicably by way of a joint petition; and

(h) the incident where the PW was allegedly sustained injuries at the hands of RH was witnessed by third parties that said the PW was not traumatised as alleged;

I hold that these are issues that would ultimately be addressed during the final determination of the petition for judicial separation where the parties will have equal opportunities to argue their cases. As for the injunctive order, it remains to preserve the status of the parties as so ordered until that day. I hold that there are sufficient materials presently before the court for the injunctive relief to remain operative.

[30] I refer to the voluminous affidavits from the PW and the RH regarding the act of domestic violence by the RH. It can be seen to reveal conflicting versions in material particulars regarding the existence or otherwise of such an act or it was just an isolated act as in the present case. I refer to the case of *Jennifer Patricia a/p Thomas v Calvin Martin a/l Victor* where Low Hop Bing J held as follows:

> 42. In this regard, the affidavits of the parties herein do reveal conflicting versions in material particulars concerning the existence or otherwise of domestic violence.
>
> 43. Be that as it may, there can be no doubt in my mind that there are complaints in the form of police reports lodged by the wife in relation to domestic violence and that these complaints are now an integral part of the instant proceedings. That being the case, the wife has in my view established a case within the ambit of s 5 of the 1994 Act. I therefore make an order in terms of prayer (d) in favour of the wife and children of the marriage only. This is however subject to the exercise of the husband's rights as a joint guardian under s 5 of the 1961 Act in prayer (a) above, for which a seven-day prior notice must be given by the husband to the wife.

[31] Similarly in the present case, even though the affidavits of parties contradict each other, there can be no doubt in my mind that there is a complaint in the form of a police report lodged by PW and the IPO (lapsed) in relation to domestic violence and that this complaint is now an integral part of the instant proceedings. That being the case, the PW has in my view established a case within the ambit of s 103 of the LRA and I therefore make an order in terms of encl 4 (prayer (6)) in favour of PW and based on the same observation I dismissed the application (encl 21) to set aside the ex parte order granted. It has to be borne in mind that this order is pending the final determination of the petition by the PW for judicial separation. It is at the disposal of this said petition that rights of parties would ultimately be decided. Until then, the protection accorded to the PW shall continue.

CONCLUSION

[32] In light of the foregoing and after closely scrutinising the application and examining all evidence adduced before me, I allowed the PW's application (encl 4 prayer (6)) with cost of RM4,000 and I dismissed (encl 21) with cost of RM3,000 awarded to the PW.

Enclosure 4, prayer 6 allowed with costs of RM4,000 and encl 21 dismissed with costs of RM3,000.

Reported by Dzulqarnain Ab Fatar